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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHIRLEY JEAN ROBINSON, Defendant and Appellant.	A128648 (Alameda County Super. Ct. No. C161798)

Defendant and appellant Shirley Jean Robinson was convicted by a jury of six counts of forgery and four counts of identity theft after crafting a fraudulent power of attorney and notary seal to facilitate the refinancing and transfer of title to real property to her son. Defendant, who received a suspended sentence, 120 days of jail time served primarily on home electronic monitoring, and five years of probation, has timely appealed. In doing so, defendant contends several legal errors were made at trial relating to, among other things, her conviction on multiple counts of forgery with respect to a single forged document and her conviction on multiple counts of identity theft without substantial evidence to support a finding that the victim acted with reasonable diligence in discovering the crime beyond the three-year statute of limitations. For reasons set forth below, we reverse the judgment with respect to counts three through ten and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 2009, an information was filed (and later twice amended), charging defendant with the following offenses allegedly committed on December 19,

2005: (1) forgery of a power of attorney (Pen. Code, § 470, subdivision (d))[1] (count one); (2) forgery of a notary seal (§ 472) (count two); (3) identity theft against Jeanne Bente (§ 530.5, subd. (a)) (count three); (4) forgery of the handwriting of another (§ 470, subdivision (b)) (count four); (5) identity theft against Rumi Ueno (§ 530.5, subd. (a)) (count five); (6) forgery of the handwriting of another (§ 470, subdivision (b)) (count six); (7) identity theft against Rafael Martinez, Jr. (§ 530.5, subd. (a)) (count seven); (8) forgery of the handwriting of another (§ 470, subdivision (b)) (count eight); (9) identity theft against Alze Roberts (§ 530.5, subd. (a)) (count nine); and (10) forgery of the handwriting of another (§ 470, subdivision (b)) (count ten). The charges against defendant stemmed from the following series of events.

Over a decade ago, defendant purchased real property on Cherokee Street in Oakland (the Cherokee property) with the intent to operate a board and care business. Under the terms of this sale, defendant owned the Cherokee property subject to an interest-only loan that required a balloon payment in the amount of $337,000 in 1997. When this balloon payment became due, however, defendant lacked sufficient funds and, thus, lost the property through foreclosure.

In 1997 or 1998, defendant began discussions with her sister, Odessa Bolton, and a close friend and coworker, Alze Roberts, about forming a limited liability corporation to operate another board and care facility or an assisted living facility. According to this plan, Bolton and Roberts would repurchase the Cherokee property from the private investors who acquired it in foreclosure and arrange to hold title on behalf of defendant, who in turn would provide the down payment and closing costs and make all mortgage and maintenance payments. Defendant explained there were "business reasons" for not having her name on the title, one of which may have been the costly legal dispute she was engaged in with Medi-Cal. Accordingly, on July 14, 1998, Roberts and Bolton acquired the Cherokee property by co-signing on a $121,500 secured loan, with defendant contributing nearly all of the $20,744 down payment.

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[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

In December 2000, defendant arranged to have the Cherokee property refinanced. At this time, Bolton's loan obligation with respect to the property was extinguished at her request to permit her to pursue other business interests. Thus, a new loan in the amount of $224,000 was drawn up in Roberts's name only, and the nearly $98,000 in equity yielded from the refinance was, according to Roberts, given to defendant. From this time until about June 2003, Roberts made all payments related to the property. Then, in June 2003, defendant and her family moved into the property and began making monthly payments to Roberts to service the loan.

In June 2005, defendant sought to again refinance the Cherokee property with the intent to transfer title to her son, Taiye Roberts. According to Roberts, she was unaware of this proposed sale until she received escrow documents from the title company in the mail and a phone call from the lender informing her they were trying to close the deal. As part of this proposed refinance, Roberts was to receive $130,000 in cash to cover her contributions to the mortgage, as well as $85,000 as repayment of personal loans she made to defendant in 2001. Defendant, in turn, intended to give any appreciation equity to her son as a gift. Roberts had some concerns about this proposed transaction but, in any event, it never closed due to changes in loan conditions made by the lender.

In December 2005, defendant again sought to transfer ownership of the Cherokee property to her son. This time, the proposed refinance involved a "no money down" loan in which the lender would finance the entire purchase price of $600,000 through two loans, one in the amount of $480,000 and the other in the amount of $120,000, to be secured by a first and second deed on the property. Again, Roberts was to receive $130,000 of the proceeds of the transaction.

To facilitate the transaction, defendant arranged a meeting on December 19, 2005, with Karrimah Sanders, a mobile notary who was to notarize the closing documents. Sanders met with Bolton, defendant, defendant's son and an unidentified woman.[2] Roberts, however, was not present and, since her name remained on the title as owner of

[2] Defendant denied being present at this meeting and her son and sister (Bolton) corroborated her testimony.

the Cherokee property, the meeting to notarize the grant deed was rescheduled for the next day. Thus, the next morning, Sanders met again with defendant, as well as a loan officer, at a restaurant in Emeryville. At that time, defendant produced a notarized document purporting to grant her power of attorney on behalf of Roberts with respect to the Cherokee property sale. This power of attorney contained a forged notary seal, as well as the forged signatures of four people – to wit, Roberts, the property owner and defendant's longtime friend; witnesses Rumi Ueno and Jeanne Bente (as signed and initialed by her secretary, Monica Barber); and notary Rafael Martinez.[3] Sanders accepted the power of attorney from defendant and had her sign the notary book and give her thumb print.

Two days later, on December 21, 2005, Roberts received a letter from defendant's attorney, advising her of the proposed refinance of the Cherokee property and of defendant's intention to pay her $130,000 of the proceeds. The letter also included a demand that Roberts appear at the title company to sign escrow documents by the next day, when escrow was set to close, or face litigation. Roberts called the attorney and advised her that she knew nothing of the proposed transaction. The attorney told Roberts she would send her copies of the escrow documents but she never did.

Ultimately, the proposed refinance of the Cherokee property fell through because agents of the title company suspected the power of attorney submitted by defendant was a forgery and thus refused to approve the loan. Weeks later, in February 2006, defendant filed a civil lawsuit against Roberts to quiet title to the Cherokee property, to which Roberts responded with a cross-complaint. It was during the course of discovery in this civil lawsuit that Roberts first reviewed the power of attorney with her forged signature.

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[3] Testimony at trial revealed that Bente's signature had been included on a letter sent earlier to defendant at work to confirm an appointment. As on the forged power of attorney, Bente's signature was written and initialed by her secretary, Monica Barber. Martinez, in turn, had the previous month notarized and recorded a release-of-lien instrument on the Cherokee property after defendant paid off a garbage lien. Rumi Ueno's signature, however, was not traced to any particular document, and she had no apparent connection to defendant or anyone else in the case.

A warrant for defendant's arrest was subsequently issued on January 15, 2009. Trial in this criminal matter began February 22, 2010. Defendant, testifying on her own behalf, acknowledged the power of attorney was a forgery but insisted someone else had presented it to the notary and forged the signatures. Defendant also denied meeting with Sanders, the notary, on either December 19 or 20, 2005, and denied that the signature and thumb print in Sanders's notary book belonged to her.

The jury, implicitly rejecting defendant's testimony, found her guilty on all criminal counts, and the trial court thereafter suspended her sentence and placed her on probation for 5 years. The trial court also ordered her to serve 120 days in jail, with credit for time served and permission to serve the remaining days on home electronic monitoring. This timely appeal followed.

DISCUSSION

Defendant raises the following arguments on appeal: (1) she was wrongly convicted of four out of the five counts of forgery under section 470 because there was but one forged document; (2) the statute of limitations bars her conviction for each of the four counts of identity theft; (3) she cannot be convicted of both forgery (§ 470) and identity theft (§ 530.5) where the criminal conduct (forging a signature) and the victims (Bente, Ueno, Martinez and Roberts) are the same, and where section 470 is the more specific statute than section 530.5; and (4) the trial court wrongly instructed the jury regarding the impact of false testimony from a witness. We address defendant's contentions below, ultimately concluding her first two contentions have merit and require partial reversal.

I. Defendant was wrongly convicted of four of the five counts of forgery.

Defendant was charged with and convicted of five counts of forgery under section 470 – four counts pursuant to section 470, subdivision (b), and the remaining count pursuant to section 470, subdivision (d).[4] As the People concede, however, it was error

[4] Section 470, subdivision (b), provides that "Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery."

to convict defendant of four of these five forgery counts because all five counts related to defendant's forgery of signatures on a single document – the power of attorney. California law is quite clear: "Multiple forged signatures on a single document constitute but one count of forgery." (*People v. Kenefick* (2009) 170 Cal.App.4th 114, 116. See also *People v. Martinez* (2008) 161 Cal.App.4th 754, 756 ["Under Penal Code section 470, subdivision (b), . . . falsification of two signatures on a single trust deed constituted only one count of forgery"].) Moreover, this rule of one forgery count per forged document applies regardless of the fact that defendant was convicted under both subdivision (b) and subdivision (d) of section 470: "[T]here cannot be multiple convictions based on any subdivision of Penal Code section 470 where only one document is involved." (*People v. Kenefick, supra*, 170 Cal.App.4th at p. 124.) As our appellate colleagues in the Third District explain: "The rule of one count of forgery per instrument is in accord with the essence of forgery, which is making or passing a false document." (*People v. Kenefick, supra*, 170 Cal.App.4th at p. 123.)

Accordingly, four of the five counts of forgery under section 470 – to wit, counts four, six, eight and ten – must be vacated.

II. Statute of limitations bars defendant's conviction for identity theft.

Defendant also challenges her conviction on counts three, five, seven and nine for identity theft on statute of limitation grounds. The governing law is for the most part not a matter of dispute. "In California, the statute of limitations in criminal cases is jurisdictional. (*People v. McGee* (1934) 1 Cal.2d 611, 613-614 . . . ; [citation]." (*People v. Lopez* (1997) 52 Cal.App.4th 233, 244-245.) As such, in a criminal trial, the People bear the burden of proving by a preponderance of the evidence that a defendant's prosecution in not barred by the applicable statute of limitations. (*Ibid*.)

(§ 470, subd. (b).) Subdivision (d), in turn, provides in relevant part that "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any . . . power of attorney . . . ." (§ 470, subd. (d).)

Here, the parties agreed at trial that three years is the statute of limitations governing the identity theft counts.[5] (2RT 393-395, 572-573) However, undisputedly, the prosecution of this case was initiated outside the three year statutory period, in that the charged crimes occurred on December 19, 2005, while an arrest warrant was not issued for defendant until January 15, 2009, nearly 37 months later. This delay implicates the so-called discovery rule. Under the discovery rule, the prosecution can overcome what would otherwise be a statute-of-limitations bar by pleading and proving each of the following: "(1) when and how the facts concerning the fraud became known to him; (2) lack of knowledge prior to that time; (3) that he had no means of knowledge or notice which followed by inquiry would have shown at an earlier date the circumstances upon which the cause of action is founded. [Citation.]" (*People v. Zamora* (1976) 18 Cal.3d 538, 562.) Thus, as these pleading and proof requirements reflect, in this context, "the word 'discovery' is not synonymous with actual knowledge. [Citation.] 'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. . . .' " (*People v. Zamora, supra*, 18 Cal.3d at pp. 561-562, fn. omitted.)

In applying this rule, "[o]nce the [trial] court determines that the facts stated in the pleadings are sufficient and do not show, as a matter of law, that in the exercise of reasonable diligence the plaintiff could have discovered the fraud at an earlier time then the reasonable diligence question becomes an issue for the trier of fact." (*People v. Zamora, supra,* 18 Cal.3d at p. 562.) On appeal, the jury's findings with respect to reasonable diligence are issues of fact reviewable under the substantial evidence standard. (*People v. Zamora, supra,* 18 Cal.3d at p. 565.) Further, in reviewing for substantial

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[5] Both parties proceeded to trial under the assumption that a three-year statute of limitations applied. Accordingly, the trial court instructed the jury on a three-year limitations period without objection from either party. On appeal, however, the People for the first time argue that a four-year statute of limitations applies. Given the People's failure to properly raise this issue below, much less preserve it for appeal, we need not further address it. (E.g., *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *People v. Tillman* (2000) 22 Cal.4th 300, 303.)

evidence, the court must strictly construe the statute of limitations in favor of the accused. (*Id*. at p. 574; *People v. Castillo* (2008) 168 Cal.App.4th 364, 369.)

Here, the trial court instructed the jury that defendant could not be found guilty of identity theft unless the jury first found the People had proved by a preponderance of the evidence that prosecution of this case began within three years of the date that the alleged crimes were or should have been discovered:

"A defendant may not be convicted of Penal Code Section 530.5(a), Identity Theft, unless the prosecution began within three years of the date that the crimes were discovered or should have been discovered. The present prosecution began on January 15th, 2009.

"A crime should have been discovered when the victim was aware of facts that would have alerted a reasonably diligent person in the same circumstances to the fact that a crime would have been committed.

"The People have the burden of proving by a preponderance of the evidence that the prosecution in this case began within the required time, ... To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that prosecution of this case began within the required time. If the People have not met this burden, you must find the Defendant not guilty of Identity Theft."

Thereafter, in finding defendant guilty, the jury specifically found true that "the above violation was not discovered until February 2006, that the violation was discovered by Alze Roberts while reviewing documents of civil discovery, that Ms. Roberts did not have actual or constructive knowledge of the document prior to the date of discovery, and that the discovery was not made earlier because the fraudulent documents were under the control of defendant or her agents prior to the civil suit that prompted discovery[.]"[6] According to defendant, the jury's findings on this issue lack the support of substantial

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[6] This instruction, requested by the defense, was consistent with the operative information, which alleged defendant's identity theft was not discovered until February 2006 "by Alze Roberts while reviewing documents for civil discovery . . . ." The information further alleged that discovery was not made earlier because "the fraudulent documents were under the control of defendant or her agents prior to the civil suit that prompted discovery."

evidence, requiring vacation of her conviction on counts three, five, seven and nine. Having thoroughly reviewed the record, strictly construing the statute of limitations in favor of defendant as the law requires (*People v. Zamora, supra,* 18 Cal.3d at p. 574), we agree. The following evidence is relevant.

Alze Roberts, the first of the victims to discover defendant's criminal activity, did not actually discover the power of attorney with her forged signature until February 2006, when she was reviewing documents subpoenaed by her attorney in the civil case defendant brought against her. However, the record reflects that Roberts was at least alerted to the existence of the power of attorney before February 2006. Specifically, according to Roberts's testimony, on December 21, 2005, she received a letter from defendant's attorney, Phyllis Voisenat, advising her that the Cherokee property was being sold and that she had until the next day, when escrow was set to close, to execute escrow documents. If Roberts did not do so, the letter continued, defendant would sue her to quiet title.

In response to Voisenat's December 21, 2005 letter, Roberts called Fidelity National Title (Fidelity), the title company named in the letter, and spoke with two individuals regarding the proposed Cherokee property sale.[7] Initially, Roberts testified that she made this call to Fidelity "probably the next week" after receiving the letter. On cross-examination, Roberts testified that her call "may have been" placed later than one week after receiving the letter, but that she was not entirely certain. The first person at Fidelity with whom Roberts spoke advised her that an escrow account was open for the proposed Cherokee property sale, but that there were no documents in the escrow file. The second person Roberts spoke to, a supervisor, told her there were documents in the escrow file and that one of these documents was a power of attorney purportedly signed by Roberts. Roberts, who later testified that she had never executed any power of attorney on her own behalf, asked the Fidelity supervisor to send her a copy of the power of attorney with her purported signature. However, Roberts explained, "they never did,

[7] Roberts recalled that she either spoke with the two individuals from the title company in the same telephone call, or in different calls that took place on the same day.

and it was only when I went though my attorney, Bill Segesta, and he subpoenaed the records that I, actually, saw the Power of Attorney."

This record, we conclude, is sufficient to undermine the jury's finding that Roberts lacked constructive knowledge of defendant's crimes until February 2006, when she reviewed the escrow file in connection with defendant's civil suit against her. While it is true none of the victims (Bente, Ueno, Martinez or Roberts) actually knew their names were fraudulently employed by defendant on the power of attorney she created in December 2005, as pointed out above, a victim "discovers" criminal activity, not upon gaining actual knowledge of the crime, but upon gaining knowledge of "*circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud*." (*People v. Zamora*, *supra*, 18 Cal.3d at p. 572.) Under this standard, we conclude the record compels the conclusion that a person exercising reasonable diligence would have become suspicious enough to undertake a more thorough investigation of the facts in December 2005 rather than, as alleged, in February 2006. As set forth above, in late December 2005, Roberts was told by the Fidelity supervisor there was a power of attorney purportedly signed by her in the escrow file for the Cherokee property, even though she admittedly had never signed such a document.[8] This power of attorney is the very document at the heart of all of defendant's criminal activity. Indeed, evidencing that Roberts was in fact suspicious of the power of attorney at this time, she immediately asked the Fidelity supervisor for a copy of it. The unfortunate fact that the supervisor subsequently failed to adhere to Roberts's request does not undermine our ultimate conclusion that Roberts had a duty, which she failed to

[8] As the People point out, in sending the statute of limitations issue to the jury, the trial court suggested there may be evidence in the record indicating Roberts had previously executed a power of attorney with respect to the Cherokee property. As such, the trial court noted, the mere fact that the title company representative told Roberts there was a power of attorney in the escrow file for the Cherokee property that was purportedly signed by her would not necessarily put her on notice that the document was a forgery. However, Roberts later testified unequivocally that she had never before executed a power of attorney on her own behalf, undermining the trial court's reasoning in this regard.

discharge, to more thoroughly investigate the existence of this clearly suspicious document.[9]

In reaching this conclusion, we acknowledge the People's argument that Roberts's testimony regarding the timing of her conversation with the Fidelity representatives was ambiguous. Specifically, Roberts first testified that she called Fidelity "probably the next week" after receiving the December 21, 2005 letter from Voisenat. On cross-examination, Roberts testified that her call "may have been" placed later than the next week after receiving the letter. While we agree there is some uncertainty regarding when Roberts was told about the forged power of attorney, we nonetheless disagree that the record provides substantial evidence that Roberts was not told about the forged document until at least January 15, 2006, the date the statute of limitations began to run absent the benefit of the discovery rule. Indeed, the January 15, 2006 date is nearly four weeks after Roberts received Voisenat's letter, the event that undisputedly prompted her to call the Fidelity representative who advised her of the power of attorney. And, given Roberts's initial testimony that she spoke to Fidelity the "next week" after receiving Voisenat's letter, the relationship between this letter and the Fidelity phone call, and the requirement that we construe the statute of limitations in favor of defendant, we stand by our conclusion that no substantial evidence supports the jury's finding of reasonable diligence in discovering defendant's criminal activity in February 2006.[10]

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[9] In fact, the property sale was never approved because the Fidelity representatives also became suspicious of the authenticity of the power of attorney. In particular, the title company found suspicious the facts that the power of attorney was not on the standard title company form and was executed on the same day, rather than before, the escrow instructions were prepared.

[10] For purposes of the discovery rule, it is enough in this case that only one of the victims (to wit, Roberts) had constructive knowledge of defendant's commission of the underlying crimes given that each of her crimes related to the forged power of attorney which, in turn, contained the identities of all the victims. Under these circumstances, it can reasonably be assumed that, had Roberts acted with reasonable diligence, she would have discovered the forged document and then reported to law enforcement, leading promptly to the identification of the other victims. (See *People v. Zamora, supra,* 18 Cal.3d at pp. 571-572 [noting the "crucial determination is whether *law enforcement*

Accordingly, because defendant's prosecution was not initiated within the applicable three-year statutory period, her conviction on all four counts of identity theft is invalid and void.[11] (*People v. Zamora*, *supra*, 18 Cal.3d at p. 547.)

DISPOSITION

The convictions on counts three, four, five, six, seven, eight, nine and ten are vacated. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for further proceedings in light of these changes.

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authorities or the victim had actual notice" of suspicious circumstances] [emphasis added].) This reasoning is consistent with the purpose of the discovery rule – to allow tolling of the statutory period "because no one other than the criminals themselves even knows that a crime has been committed." (*Id*. at p. 572 fn. 33.)

[11] We therefore need not reach defendant's remaining contentions regarding her conviction for identify theft with one exception. Defendant raises a more general claim of instructional error that, if valid, would require reversal on all counts – to wit, that the trial court erroneously instructed the jury based on CALCRIM 226 rather than CALJIC No. 2.21.2 with respect to false testimony. According to defendant, CALCRIM 226 lacks CALJIC No. 2.21.2's "critical admonition" that a witness who gives willfully false testimony in one regard "is to be distrusted" in all other regards. We disagree. First, neither CALJIC No. 2.21.2 nor CALCRIM 226 requires a juror to reject all testimony from a witness who has testified falsely about something. Rather, both instructions *permit* a juror to do so. (*People v. Beardslee* (1991) 53 Cal.3d 68, 95 ["[CALJIC No. 2.21.2] at no point *requires* the jury to reject any testimony; it simply states circumstances under which it *may* do so"]; *People v. Vang* (2009) 171 Cal.App.4th 1120, 1130 ["The last paragraph of CALCRIM No. 226 serves the same purpose as CALJIC No. 2.21.2. Like the CALJIC instruction, it tells the jurors that if they find a witness lied about a material part of his testimony, they may, but need not, choose to disbelieve all of his testimony"].) Thus, in this regard, both instructions accurately reflect the California law. Second, while defendant correctly notes that CALJIC No. 2.21.2 has been approved by the California Supreme Court, this does not mean the trial court's failure to give it constitutes error. While jurors must be properly instructed on how to evaluate witness credibility, "State law d[oes] not entitle appellant to have them instructed with any particular language." (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 555.) Thus, we join other appellate courts in declining to be persuaded " 'that semantic differences between CALCRIM 226 and CALJIC No. 2.21.2 are even material, let alone prejudicial' (*People v. Warner* (2008) 166 Cal.App.4th 653, 659) . . ." (*People v. Lawrence*, *supra*, 177 Cal.App.4th at p. 554.)

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.